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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>VINCENT D. THOMAS,<br><br>Defendant and Appellant. | B289384<br><br>(Los Angeles County Super. Ct. No.MA071807) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Lisa Mangay Chung, Judge. Affirmed.

Donna Ford, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

A jury found defendant Vincent Thomas guilty of one count of inflicting corporal injury on his girlfriend and acquitted him of two counts of witness intimidation. The trial court sentenced him to a total of nine years in prison.

Defendant timely appealed. His appointed counsel filed a brief that raised no issues and requested independent review of the record pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*). Defendant filed a supplemental brief in which he contends the prosecutor failed to prove that he and the victim were in a "dating relationship," that his counsel rendered ineffective assistance, and that the trial court erred in imposing the high term sentence, issuing protective orders, and calculating his presentence custody credits. The trial court already has corrected the error in defendant's presentence custody credits. None of the other issues raised by defendant constitutes reversible error, and our independent review of the record does not reveal any other arguable issues. We accordingly affirm.

**PROCEDURAL HISTORY**

An amended information charged defendant with inflicting corporal injury on his girlfriend, Victoria S. (Pen. Code, § 273.5, subd. (a))[1], dissuading Victoria from reporting the crime (§ 136.1, subd. (b)(1)), and dissuading a witness to the crime, Tina V., from reporting it (§ 136.1, subd. (b)(1)). The information further alleged that defendant suffered two strike priors (§§ 667, subds. (b)-(j), 1170.12); a 1983 burglary conviction and a 2012 criminal threats conviction; two serious felony convictions (§ 667, subd. (a)(1)); and one one-year prison prior (§ 667.5, subd. (b)). Defendant pled not guilty and denied the allegations. Defendant

[1]All further statutory references are to the Penal Code unless otherwise indicated.

waived his right to counsel and acted in propria persona during pretrial proceedings. He filed a motion to set aside the information and dismiss the case, as well as evidentiary objections related to the preliminary hearing. The trial court reviewed the preliminary hearing transcript and denied defendant's motion. It also denied defendant's evidentiary objections without prejudice.

Defendant relinquished his propria persona status and invoked his right to counsel prior to trial. The trial court appointed counsel to represent him. Defense counsel successfully moved to bifurcate trial of defendant's priors from trial of the substantive offenses.

Defendant proceeded to jury trial on the substantive offenses. The jury found him guilty of inflicting corporal injury on Victoria but acquitted him of the other charges. The trial court subsequently found all of the priors true. The trial court denied defendant's motion to strike his prior strikes pursuant to *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497. It sentenced him to the high term of four years, doubled to eight years pursuant to the prior criminal threats strike conviction, plus an additional one year for the prison prior.[2] The court awarded defendant a total of 472 days of custody credit and issued protective orders for both Victoria and Tina; Tina had alleged before trial that defendant's family members were threatening her.

Defendant timely appealed. His appointed counsel requested that the trial court correct defendant's presentence credits to include an additional 106 days. The court granted the

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[2]It is unclear from the record why the court did not use the 1983 burglary conviction to enhance defendant's sentence.

request and amended the abstract of judgment to reflect a total of 578 days of presentence credit.

Defendant's appointed counsel then filed a no-issue *Wende* brief in this court. Counsel sent defendant a copy of the brief and trial transcripts and informed him of his right to file a supplemental brief. We also sent a letter, dated October 9, 2018, advising defendant of his right to file a supplemental brief. Defendant timely filed a supplemental brief.

**FACTUAL BACKGROUND**

Around 5:30 a.m. on July 31, 2017, Tina V. was hanging laundry on the balcony of her Lancaster apartment when she heard a commotion. A man she identified in court as defendant was yelling at a woman. As Tina looked on, defendant punched the woman in the face three times, knocking her to the ground. Tina hurried downstairs and outside, where she saw the woman lying in a "big pool of blood." Defendant continued to yell at the woman, telling her to get up and get back on her bicycle. Tina told defendant that he would be going to jail, and defendant responded that she should mind her own business or else Tina would "get the same thing she got and that he would send his homegirls or homeboys after me."

Other tenants of Tina's apartment building came over, as did the building's two security guards. Tina told one of the security guards to call the police. She then got on her bicycle and started following defendant and the woman, who were leaving the scene. The other security guard followed them in his patrol car. Tina stopped following them when law enforcement arrived.

David Villagomez testified that he was on duty as an overnight security guard at an apartment building in Lancaster on the morning of July 31, 2017. Around 5:30 or 5:40 a.m., he

heard yelling and screaming and saw a woman lying on the ground. A man he identified in court as defendant was standing over her, telling her to get up: "Hurry the fuck up, bitch. I fucking told you." Villagomez testified that the woman looked unconscious or was otherwise taking her time to get up. At the urging of onlookers, who were yelling that defendant "hit a girl," Villagomez called police. He also asked his colleague, who was on patrol duty, to follow defendant and the woman.

Victoria S. testified that she and defendant, whom she referred to as her "boyfriend," had been dating for about two months as of July 31, 2017. They were on an early morning bike ride when they got into an argument. Victoria called defendant a "dumb ass," and he got off his bike and punched her "right dead center on my lip." The punch split Victoria's lip and knocked her to the ground. While she was on the ground, she saw a puddle of blood and heard defendant say, "Come on. Let's go. I'm walking you back to your house." She also saw onlookers, some of whom said they were going to call the police. Defendant told the onlookers, "It is my girlfriend. I got this. I am handling it." He then started walking Victoria to her house; some of the onlookers followed. Victoria told defendant to leave because she did not want him to get arrested, but he stayed with her all the way to her house. When the police arrived, they took photographs of her injuries. Several of the photographs were admitted into evidence. On cross-examination, Victoria testified that defendant was her boyfriend, that they texted and saw one another "[a]lmost every day," and that "he would buy me things sometimes like a boyfriend would."

Los Angeles County Sheriff's deputy Nathan Ferrell testified that he responded to a call in Lancaster around 5:40

a.m. on July 31, 2017. He spoke to Tina, who directed him to defendant. Ferrell took defendant into custody and advised him of his *Miranda*[3] rights. Defendant then told him that he and Victoria had been riding their bicycles when they "got into an argument about relationship issues." Ferrell spoke to Victoria, who was "very hesitant to speak with" him, and took photographs of her injuries. Ferrell also took a photograph of defendant after he was booked; that photograph was admitted into evidence.

Defendant invoked his Fifth Amendment right to remain silent and rested on the prosecution's evidence.

## DISCUSSION

In his supplemental brief, defendant contends that he and Victoria did not have a "dating relationship" sufficient to support his conviction under section 273.5, subdivision (a); that his counsel rendered ineffective assistance; that the Sixth Amendment and *Cunningham v. California* (2007) 549 U.S. 270 (*Cunningham*) barred the trial court from sentencing him to the upper term; that the trial court miscalculated his presentence credits; and that the trial court abused its "power of authority" by issuing protective orders for Victoria and Tina. We consider his arguments in turn.

### I. Dating Relationship

The jury found defendant guilty of violating section 273.5, subd. (a), which prohibits the willful infliction of "corporal injury resulting in a traumatic condition upon a victim described in subdivision (b)." One of the victims described in subdivision (b) is "The offender's fiancé or fiancée, or someone with whom the offender has, or previously had, an engagement or dating relationship, as defined in paragraph (10) of subdivision (f) of

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[3] *Miranda v. Arizona* (1966) 384 U.S. 436.

Section 243." (§ 273.5, subd. (b)(3).) Section 243, subdivision (f)(10) defines a "dating relationship" as "frequent, intimate associations primarily characterized by the expectation of affectional or sexual involvement independent of financial considerations." In *People v. Rucker* (2005) 126 Cal.App.4th 1107, 1116 (*Rucker*), the court held that this definition does not require "'serious courtship,' an 'increasingly exclusive interest,' 'shared expectation of growth,' or that the relationship endures for a length of time." It explained that even "relatively new dating relationship[s]" may have the requisite "frequent, intimate associations." (*Ibid.*) By contrast, mere "casual business or social relationship[s]" may not be enough to meet the standard. (*Id.* at p. 1117.)

Defendant contends that "a dating relationship was never established by the D.D.A." "'When a defendant challenges the sufficiency of the evidence, "'[t]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt."' [Citation.] . . . 'Although a jury must acquit if it finds the evidence susceptible of a reasonable interpretation favoring innocence, it is the jury rather than the reviewing court that weighs the evidence, resolves conflicting inferences and determines whether the People have established guilt beyond a reasonable doubt.' [Citation.] '"If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment."'" (*People v. Casares* (2016) 62

Cal.4th 808, 823-824.)

Here, the evidence supported the jury's conclusion that defendant and Victoria were in a "dating relationship." Victoria referred to defendant as her "boyfriend" and testified that they spent time together "almost every day." Defendant bought Victoria gifts, "like a boyfriend would," told onlookers that Victoria was his "girlfriend," and told deputy Ferrell that he and Victoria had been arguing about "relationship issues." The jury reasonably could conclude from this testimony that defendant and Victoria, who were on a bicycle ride together at dawn when the incident occurred, were in a dating rather than merely social or business relationship.

The sole case defendant cites, *Oriola v. Thaler* (2000) 84 Cal.App.4th 397 (*Oriola*), "considered the meaning of the phrase 'dating relationship' in the context of an application for a restraining order under the Domestic Violence Prevention Act," which also applies to "dating relationships." (*Rucker*, *supra*, 126 Cal.App.4th at p. 1115.) It concluded, that, "for the purposes of that Act, a 'dating relationship' refers to serious courtship. It is a social relationship between two individuals who have or have had a reciprocally amorous and increasingly exclusive interest in one another, and shared expectation of the growth of that mutual interest, that has endured for such a length of time and stimulated such frequent interactions that the relationship cannot be deemed to have been casual." (*Oriola*, *supra*, 84 Cal.App.4th at p. 412.) The *Oriola* court concluded that an applicant for a restraining order under the Domestic Violence Prevention Act did not demonstrate a "dating relationship" under that definition where she and the party sought be restrained "went on four social outings (on only one of which they were

alone) and had telephone conversations, e-mail correspondence and contacts at the gym for a period of several months," and the applicant informed the other party that "she was not interested in a romantic relationship with him; their relationship was relatively brief and never exclusive . . . and [the party sought to be restrained] was immediately disabused of any expectation that an exclusive romantic relationship might be established." (*Ibid.*)

"After *Oriola* was decided, the Legislature enacted a definition of 'dating relationship'" that is identical to that set forth in section 243, subdivision (f)(10). (*Rucker*, *supra*, 126 Cal.App.4th at p. 1116.) Defendant's reliance on the *Oriola* definition, which predates the currently applicable definition, is thus misplaced. Moreover, *Oriola* is factually distinguishable. There is no indication that either defendant or Victoria ever "disabused" the other "of any expectation that an exclusive romantic relationship might be established." To the contrary, they referred to one another as "boyfriend" and "girlfriend" and spent time together "almost every day."

**II. Ineffective Assistance of Counsel**

Defendant appears to suggest, by citing the seminal case *Strickland v. Washington* (1984) 466 U.S. 668, and the recent case *McCoy v. Louisiana* (2018) --- U.S. ---, 138 S.Ct. 1500, that his trial counsel rendered ineffective assistance (*Strickland*) or improperly conceded his guilt without his permission (*McCoy*). Defendant does not provide any further details, record citations, or argument on these points.

"A criminal defendant's federal and state constitutional rights to counsel (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15) include the right to effective legal assistance." (*People v. Mai* (2013) 57 Cal.4th 986, 1009, italics omitted.) "When

challenging a conviction on grounds of ineffective assistance, the defendant must demonstrate counsel's inadequacy. To satisfy this burden, the defendant must first show counsel's performance was deficient, in that it fell below an objective standard of reasonableness under prevailing professional norms. Second, the defendant must show resulting prejudice, i.e., a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different." (*Ibid.*) "[A] defendant claiming ineffective representation 'must show ... that counsel's deficient performance . . . "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." [Citations.]'" (*People v. Mendoza* (2000) 24 Cal.4th 130, 158.)

In reviewing claims of ineffective assistance of counsel, we presume "'that counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy.' " (*People v. Gamache* (2010) 48 Cal.4th 347, 391.) "'Defendant thus bears the burden of establishing constitutionally inadequate assistance of counsel.'" (*Ibid.*) "'If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation.'" (*Ibid.*)

Defendant has not pointed to any action(s) or inaction(s) by counsel that allegedly fell below an objective standard of reasonableness, nor does he argue his counsel's action(s) or inaction(s) prejudiced him in any way. His reference to *McCoy* suggests that he believes his counsel impermissibly conceded his

guilt, perhaps through counsel's remark during opening statement that defendant "allowed his anger to cause him to put his hands on [Victoria]," or his comment during closing argument that "I don't think it is likely that any one of you would doubt that Vince Thomas struck Victoria."

While "a defense attorney's concession of his client's guilt, lacking any reasonable tactical reason to do so, can constitute ineffectiveness of counsel," (*People v. Gurule* (2002) 28 Cal.4th 557, 611), a defense attorney cannot be faulted for adopting "a 'realistic approach' based on the evidence that has been or will be presented, or for concluding that candor would be an effective strategy in the face of that evidence." *(Id.* at p. 612.) Here, the evidence showed—via photographs, witness, and victim testimony—that defendant punched Victoria in the face. Defense counsel's acknowledgement of that fact was realistic. More importantly, it did not concede defendant's guilt. Defense counsel argued, as defendant does here, that defendant was not guilty of the charged offense because he and Victoria did not have a "dating relationship." After reviewing the testimony and the statutory definition of "dating relationship," counsel argued, "until you show that's the way the relationship is, you can't have this offense even if someone punched a woman." This was not a concession of defendant's guilt, nor was it an unreasonable trial strategy.

**III. Upper Term Sentence**

Defendant argues that the trial court erred by sentencing him to the upper term of four years rather than the midterm of three years. He contends that, under *Cunningham*, *supra*, the midterm was the maximum term to which he could be sentenced, absent jury findings of aggravating facts. We disagree.

In *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, the U.S. Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." The Court later clarified that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." (*Blakely v. Washington* (2004) 542 U.S. 296, 304.) In *Cunningham*, the Court applied these principles to California's determinate sentencing law, which at that time provided that "'the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime.'" (*Cunningham*, *supra*, 549 U.S. at p. 277, quoting former § 1170, subd. (b).) The Supreme Court concluded that the determinate sentence as then written violated the Sixth Amendment as interpreted in *Apprendi* and *Blakely* by "assign[ing] to the trial judge, not the jury, authority to find the facts that expose a defendant to an elevated 'upper term' sentence." (*Cunningham*, *supra*, 549 U.S. at p. 274.)

The California Legislature responded to *Cunningham* by amending section 1170, subdivision (b), to its current form, which allows trial judges broad discretion in selecting a term within a statutory range. (See *People v. Wilson* (2008) 164 Cal.App.4th 988, 992.) Under the revised version of section 1170, subdivision (b), which is applicable to defendant's case, "(1) the middle term is no longer the presumptive term absent aggravating or mitigating facts found by the trial judge; and (2) a trial judge has the discretion to impose an upper, middle or lower term based on reasons he or she states." (*Ibid.*) Thus, the current version of the

law requires the trial court "to specify reasons for its sentencing decision, but . . . not . . . to cite 'facts' that support its decision to weigh aggravating and mitigating circumstances." (*People v. Sandoval* (2007) 41 Cal.4th 825, 846-847.)

Defendant does not contend that the trial court abused that discretion, only that the upper term sentence violated his Sixth Amendment rights. For the reasons we explained above, it did not.

**IV. Presentence Credits**

Defendant argues that the trial court incorrectly calculated his presentence credits. As we related above, however, his appellate counsel identified the error, notified the court, and secured a corrected abstract of judgment. Defendant has not pointed to any additional error in the calculation of his custody credits, and the record does not reflect any.

**V. Protective Order**

Defendant's final contention, unsupported by any authority, is that the trial judge "abuse[d] her power of authority" by issuing a restraining order barring him from contact with Tina V. even though he was acquitted of dissuading Tina V. from testifying. He also requests that we terminate "any & all orders" by the trial judge, which we interpret to mean the similar restraining order barring him from contacting Victoria S.

The version of section 136.2, subdivision (a)(1) in effect at the time the court issued the order provided: "Upon a good cause belief that harm to, or intimidation or dissuasion of, a victim or witness has occurred or is reasonably likely to occur, a court with jurisdiction over a criminal matter may issue orders, including . . . (D) An order that a person described in this section shall have no communication whatsoever with a specified witness or a

victim, except through an attorney under reasonable restrictions that the court may impose" and "(G)(i) An order protecting a victim or witness of violent crime from all contact by the defendant, or contact, with the intent to annoy harass, threaten, or commit acts of violence, by the defendant." Subdivision (i)(1) further provided that "In all cases in which a criminal defendant has been convicted of a crime involving domestic violence as defined in Section 13700 . . . the court, at the time of sentencing, shall consider issuing an order restraining the defendant from any contact with a victim of the crime." Subdivision (i)(2) similarly provided that "In all cases in which a criminal defendant has been convicted of a crime involving domestic violence as defined in Section 13700 . . . the court, at the time of sentencing, shall consider issuing an order restraining the defendant from any contact with a percipient witness to the crime if it can be established by clear and convincing evidence that the witness has been harassed, as defined in paragraph (3) of subdivision (b) of Section 527.6 of the Code of Civil Procedure, by the defendant."[4]

These provisions gave the court the authority to issue the challenged protective orders. "Domestic violence" as defined in section 13700, subdivision (b) includes "abuse committed against an adult . . . who is a . . . person with whom the suspect . . . has

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[4]Code of Civil Procedure, section 527.6, subdivision (b)(3) defines "harassment" as "unlawful violence, a credible threat of violence, or a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose. The course of conduct must be that which would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the petitioner."

had a dating or engagement relationship." Tina V. reported that she was "getting threats from various people claiming to be the defense family members," and testified that she was staying with friends because she did not feel safe in her apartment due to "people . . . saying stuff to me" and telling her not to come to court. Tina also testified that she had requested relocation assistance. The court could find from this testimony that Tina had been harassed at defendant's direction.

## VI. *Wende* Review

We have independently reviewed the entire record. We are satisfied that no arguable issues exist and appellant has received effective appellate review of the judgment entered against him. (*Smith v. Robbins* (2000) 528 U.S. 259, 277-279; *People v. Kelly* (2006) 40 Cal. 4th 106, 123-124.)

## DISPOSITION

The judgment of the trial court is affirmed.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

COLLINS, J.

We concur:

MANELLA, P. J.

WILLHITE, J.